MOTION FILED

JAN 31 1985

ORIGINAL

IN THE SUPREME COURT OF THE UNITED STATES

RECEIVED
FEB 9 1985
OFFICE OF THE CLERK
SUPREME COURT, U.S.

Supreme Court, U.S.
FILED
JAN 31
Alexander L. Stevas, Clerk

CASE NO. 84-1178

STATE OF FLORIDA,

Petitioner

v.

THOMAS RAPHAEL FASENMYER,

Respondent.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

The Respondent, Thomas Raphael Fasenmyer, asks leave to file his Opposition to the petition for writ of certiorari filed by the Petitioner, State of Florida, without prepayment of costs and to proceed in forma pauperis. The Respondent has not sought leave to so proceed previously in any federal court, since this case has never been presented to any lower federal court. The Respondent has been represented by private counsel throughout the State court system, but is unable to retain counsel for these proceedings. The Respondent's affidavit in support of this motion is attached hereto.

Thomas Raphael Fasenmyer

Thomas Raphael Fasenmyer
P.O. Box 11035
Jacksonville, FL 32211

Respondent, pro se

# A F F I D A V I T

I, THOMAS RAPHAEL FASENMYER, being first duly sworn according to law, depose and say that I am the Respondent in the above-entitled case; that in support of my motion to proceed without bding required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said case or give security therefor; and that I believe I am entitled to redress.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of procee ding in this Court are true.

1. I am not presently employed.

   a. N/A

   b. 1973. $16,000.00 per year.

2. I have not received within the past twelve months any income from a business, prof ession or other form of self-employment, of in the form of rent payments, interest, dividends or other source.

   a. N/A

3. I do own case and a savings account.

a. Cash, $3.90. Bank account, $69.33

4. I do not own any real estate, stocks, bonds, notes or other valuable property. I do own an automobile.

   a. 1965 Chevrolet. Value: $100.00

FEB 9 1985
OFFICE OF THE CLERK
SUPREME COURT, U.S.

5. I have no dependants at this time other than myself.

I understand that a false statement or answer to any q estions in this affidav it will subject me to penalties for perjury.

Thomas Raphael Fasermyer

Thomas Raphael Fasermyer
P.O. Box 11035
Jacksonville, FL 32211

Respondent, pro se

STATE OF FLORIDA

ss

COUNTY OF DUVAL

SUBSCRIBED AND SWORN TO before me this 6th day lf February, 1985.

Virginia Tracki

NOTARY

NOTARY PUBLIC, STATE OF FLORIDA
My commission expires Sept. 22, 1985

ORIGINAL

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1984

No. 84-1178

FILED
MAR 31 1985
ALEXANDER L. STEVAS
CLERK

RECEIVED
JAN 31 1985
OFFICE OF THE CLERK
SUPREME COURT, U.S.

STATE OF FLORIDA,

Petitioner,

vs.

THOMAS RAPHAEL FASENMYER,

Respondent.

MOTION TO DENY PETITION FOR WRIT OF CERTIORARI

Comes now the Respondent, Thomas Raphael Fasenmyer, pro se, who moves the Court to deny the Petitioner's Petition for Writ of Certiorari, and in support would show:

PRELIMINARY STATEMENT

The Respondent has been represented by private counsel throughout all proceedings in the State of Florida, but this litigation has utterly impoverished him to the point that he cannot retain counsel to represent him before this Honorable Court. Thus, he has no choice but to respond to the Petitioner's petition for writ of certiorari, pro se.

STATEMENT OF THE CASE

The Respondent accepts and adopts the Statement of the Case submitted by the Petitioner.

REASONS WHY THE
THE PETITION SHOULD BE DENIED

The Petitioner has misstated the facts and/or the law repeatedly throughout his entire argument. By so doing, he has misrepresented to this Honorable Court that a conflict of decisions has arisen when, in fact, there is none. In response to his argument, the Respondent would show that the Florida Supreme Court did not make a distinction between which court vacated the judgments and sentences involved, the true fact is that NO court vacated the original judgments and sentences for Counts II and III prior to the trial court's imposition of SECOND judgments and sentences for these two counts. By imposing new judgments and sentences for these two counts without the original judgments and sentences being vacated, placed the Respondent under two judgments and two sentences for the same criminal episodes.

The Petitioner would have this Court believe that at the time of resentencing following the mandated resentencing in Count I, the slate had been wiped clean and relies on North Carolina v. Pearce, 395 U.S. 711, 721 (1969) to show that under these circumstances, it was entirely proper for the trial court to impose any sentence it chose so long as it did not offend due process. The fact is that in the instant case, the slate was not wiped clean, only Count I haveing been reversed by the Appellate Court, leaving Counts II and III intact. In such a case North Carolina v. Pearce is not relevant.

The Petitioner attempts to inject United States v. Busic, 639 F.2d 940 (3d Cir.), cert. denied, 452 U.S. 918 (1981) and supporting

authority of United States v. Moore, 710 F.2d 270 (6th Cir.), cert. denied, ___U.S.___, 104 S.Ct. 497 (1983), but these are misplaced. Neither is on point with the instant case. While it is true, the Florida Supreme Court did make reference to United States v. Busic, supra, in dictum, it was only in giving an analysis of similar cases, but the Court then went on to show the distinction with the instant case. In Moore, supra, the defendant did challenge his entire sentencing array, thus, when the case was returned to the trial court for resentencing, the slate, so far as sentencing, was wiped clean and the trial court was free to impose any sentence not offending due process.

The Petitioner's reliance on United States v. Covelli, 738 F.2d 847, 862 (7th Cir. 1984) suffers the same defect as his reliance on United States v. Busic, supra. In Covelli, as in Busic, the appellate court vacated all the sentences and remanded for appropriate resentencing de novo. And once again, this was NOT done in the instant case, the appellate court vacating the judgment and sentence for Count I, but approving and leaving intact the judgments and sentences for Counts II and III.

The Petitioner, represented by an Assistant Attorney General, still seemingly does not understand the difference between Ex Parte Lange, 18 Wall. 163, 21 L.Ed 872 (1874) and United States v. DiFrancesco, 449 U.S. 117 (1980). It does appear that many courts interpreted Lange to read that once service of a sentence had begun, it was constitutionally impermissible to change it, i.e. United States v. Benz, 282 U.S. 304 (1931), and several others, and DiFrancisco, supra, condemned that interpretation. But no court ever, DiFrancesco or any other, has condemned the correct holding of Ex Parte Lange, which was that once service of

of a sentencing alternative had been satisfied in full, the court was without power to impose a second sentencing alternative. Even the Busic decision which the Petitioner erroneously relies on, points out that distinction. And it is upon this rationale that the Florida Supreme Court vacated the resentence imposed on the Respondent for Count II.

To order a sentence to be served concurrently or consecutive to another sentence is clearly a sentencing alternative available to the trial court. Thus when, in the instant case, the sentence for Count II was originally ordered to be served concurrently with Count I, and to commence running June 24, 1973, that sentencing alternative was satisfied in full on June 24, 1978. Hence, it was patently unconstitutional for the trial court to impose the second sentencing alternative, consecutive to Count I in 1982, four years after the first sentencing alternative had been satisfied in full, and the Florida Supreme Court condemned it as such. Were the resentence have been allowed to stand, the Respondent would have to serve BOTH sentencing alternatives for the same criminal episode. The vacating of this resentence for Count II on double jedpardy grounds is not in conflict with any of the camouflaging authority authority relied on by the Petitioner.

The vacating of the resentence for Count III had nothing to do with constitutional law or double jeopardy and conspicuously absent from Petitioner's petition is any argument assigning as error the Florida Supreme Court's vacating the trial court's resentence as to Count III. Rather, the VACATING OF the resentence for Count III was a result of Florida Legislature mandating, in §775.041 (1981) Florida Statutes, that each separate offense carry a discrete sentence. Hence, the concept of "total aggregate sentence"

is not recognized in Florida when dealing with resentencing. Each count must receive a sentence unto itself, and if an error occurs in one sentence, it must be corrected without any reference to any other sentence.

Interestingly, the Petitioner, himself, relied on Herring v. State, 411 So.2d 966 (Fla. 3rd DCA 1982) in the court below but has abandoned this "support" in this Honorable Court. A reading of Herring shows why:

> "The cases which hold that an unattacked legal sentence cannot be disturbed when an illegal sentence is set aside and a new sentence imposed arises in a setting where a sentence on one count is legal and the sentence on another illegal. In that context, the legal sentence is considered untouchable because it is self-contained."
> —Herring, supra, at 969 (Emphasis added).

The Petitioner has abandoned Herring because Herring obviously defeats the novel argument he now attempts to urge upon this Honorable Court.

## C O N C L U S I O N

Certiorari should not be granted because the decision of the Florida Supreme Court in the instant case is not in conflict with Busic v. United States, DiFrancesco v. United States, or any other decision cited by the Petitioner. The Supreme Court vacated the resentence on Count II because it violated the double jeopardy proscription of both the United States and Florida constitutions since it exposed the Respondent to the double punishments of both sentencing alternatives. The vacating of the resentence for Count III was not based on constitutional law, but rather because it violated state law announced by legislature in §775.041, Florida

Statutes (1981).

There is no conflict certiorari could resolve.

Respectfully submitted,

Thomas Raphael Fasenmyer
P.O. Box 11035
Jacksonville, FL 32211
Respondent, pro se

I HEREBY CERTIFY that I am utterly without funds to have this pleading printed and bound to comply with the rules of this Court.

Thomas Raphael Fasenmyer

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to: Mr. Lawrence A. Kaden, Asst. Atty. Gen., Suite 1501 The Capitol, Tallahassee, FL 32301 on this 27th day of January, 1985.

Thomas Raphael Fasenmyer